Filed 12/31/12 In re P.W. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re P.W., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. SAMANTHA W., Defendant and Appellant.	G047076 (Super. Ct. No. DP-022217) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jane Shade, Temporary Judge. (Pursuant to Cal. Const., art VI, § 21.) Affirmed.

Pamela Rae Tripp, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Julie J. Agin, Deputy County Counsel, for Plaintiff and Respondent.

No Appearance for the Minor.

* * *

Samantha W. (mother) appeals from judgment terminating dependency court jurisdiction over her son, P.W., and vesting sole custody in his father, Edward H. (father), without any provision for visitation. Mother argues the order must be reversed because there was insufficient evidence to support the court's determination it was in P.W.'s best interests to deny her visitation; there was insufficient evidence of changed circumstances to support father's petition for an order under Welfare and Institutions Code section 388; and because she was not given proper statutory notice of father's petition. We find none of these contentions persuasive, and affirm the judgment.

FACTS

Five-month-old P.W. was taken into protective custody by the Orange County Social Services Agency (SSA) on February 9, 2012. He had been residing with mother and his half-sister, N.B., who was previously declared a dependent of the juvenile court, but had been released to mother's care for a 60-day trial visit. SSA took both children into custody following reports that mother was leaving the children unsupervised for significant periods of time, neglecting N.B.'s medical needs and engaging in domestic violence with the maternal grandmother.

The petition alleged that dependency jurisdiction over P.W. was appropriate based on mother's failure to protect him (Welf. & Inst. Code, § 300, subd. (b)), and her abuse of N.B. (Welf. & Inst. Code, § 300, subd. (j); all further statutory references are to the Welfare and Institutions Code.) Father was identified in the jurisdictional petition and it was alleged he "knew or reasonably should have known that . . . mother was placing [P.W.] at significant risk of abuse and neglect as evidenced by . . . [his] own statements that he was concerned for the welfare of the child while in the mother's care."

The detention hearing commenced on February 15, 2012, and while father was present, mother was not. The court initially appointed the public defender to represent father, but the deputy public defender present declared a conflict on the basis she already represented mother in the dependency case involving N.B. The court then appointed the public defender to represent mother and appointed juvenile defenders to represent father. Mother's counsel informed the court that her office had been in contact with mother earlier in the day, and mother reported she was having trouble getting to court. However, counsel had not had the opportunity to discuss the detention issues with mother. On that basis, mother's counsel requested a one-day continuance in the detention hearing. The court agreed to defer the detention hearing until 8:30 a.m. the following day.

Due to the press of other matters, the detention hearing did not resume the following morning. Instead, it was pushed back into the afternoon session and commenced at 1:45. At that point, mother was not present. Her counsel represented to the court that mother had been present earlier in the day and the two of them had spoken briefly. Counsel stated she believed mother had been made aware the hearing would resume at 1:30, but could not say "with certainty" she advised mother to return to court. She informed the court that mother was requesting an additional continuance so that she could retain private counsel. The court denied the continuance.

The court then granted father's request to keep his new address confidential due to concerns about mother's behavior. As father's counsel explained "[a]t this point I have no basis to request a restraining order against mother. But I have advised my client that should he start receiving any threatening messages or being on the receiving end of any threats to his person or his family, that he is to contact police authorities immediately and then call my office so that I can put the matter on calendar for an emergency restraining order on an ex parte basis."

Father's counsel then asked the court to release P.W. into his custody, pointing out father was a non-offending parent, who was a stay at home parent to P.W.'s half-siblings. After hearing some testimony from father about his relationship with P.W., the court declared him to be P.W.'s presumed father.

Mother arrived at the hearing shortly thereafter. After briefly conferring with her, mother's counsel again asked the court for a continuance so mother could retain private counsel. The court again denied the request. After questioning mother about P.W.'s paternity, the court declared a brief recess to allow mother's counsel to confer with her about the issues before the court. When the hearing reconvened, however, mother was no longer present. Her counsel informed the court mother's "last statement before she left was she's fine with the child being placed with the father."

The court then ordered P.W. released into the custody of father. With respect to visitation, mother's counsel suggested that because it would likely order her visitation to be professionally monitored, it should take place in Orange County, rather than in Lake Elsinore, where father lived. She requested a visitation schedule of three times per week, for two hours per visit, with the "understanding the court may deviate from that in light of the age of the child and the distance of travel." P.W.'s counsel objected to visitation in excess of once per week and SSA requested a schedule of two visits per month, which was agreeable to father. The court ordered mother would have professionally monitored visitation twice per week, for two hours, at a confidential location chosen by SSA.

On March 2, the court held a hearing on father's request for a temporary restraining order against mother. It noted on the record that all parties had been served with the application for a restraining order through counsel and mother's counsel appeared on her behalf. Mother's counsel informed the court she had an "electronic communication" with mother concerning the application, and mother stated she was opposed to issuance of the restraining order.

Father declared under penalty of perjury he had been receiving harassing phone calls from mother, which were disrupting his personal life and family. He also described receiving visits from both law enforcement officers and a social worker in response to allegations of child abuse made against him by mother. Father expressed concern that mother was "unstable" and might "harm [him and his] family." The request for the restraining order was supported by both SSA and P.W.'s counsel, while mother's counsel argued against it on the basis the application was not supported by sufficient evidence.

The court issued the temporary restraining order, but reiterated its prior order for twice monthly monitored visitation between Mother and P.W., "at a location that is designated by the Social Services Agency . . . not to be in father's home." The court's order specified that transportation of P.W. to the visits "must be provided by [a] SSA designee." It then set a hearing for March 22, 2012, the date previously set for the combined jurisdictional and dispositional hearing, to consider whether the temporary restraining order should be made permanent.

Mother failed to appear on March 22, 2012, and her counsel once again sought a continuance, explaining she had made efforts to notify mother of hearing dates both by e-mail and "by communication through the assigned investigator on this case," but had "no extensive conversations" with mother about the issues before the court. Counsel stated her belief that "if we were granted a brief continuance, we could secure [mother's] presence here." All other parties opposed the continuance, noting it seemed unlikely mother would appear at a later date if the continuance was granted. The court denied the continuance.

With respect to jurisdiction and disposition all parties submitted on the reports prepared by SSA. The court found by clear and convincing evidence that P.W. came within the jurisdiction of the juvenile court and that vesting custody in mother

would be detrimental to him. It ordered P.W.'s custody vested in father, with visitation for mother. The court then continued the matter to September 11, 2012, for a six-month review, and set a May 24, 2012, "termination review" hearing; i.e., a hearing to consider termination of jurisdiction. The court ordered SSA to provide notice "to all parties as required by law" and ordered mother's counsel to make "best efforts" to notify her of those dates.

With respect to the restraining order issued against mother, father requested a continuance of the hearing date on the order to show cause why the temporary order should not be made permanent. The sheriff's department had been unsuccessful in its efforts to serve mother with the temporary restraining order and order to show cause, and on that basis the court ordered the matter continued to April 5. Father's counsel informed the court that mother was continuing to call father and had indicated to him she "was back at the Vine Avenue address as listed in the report." The court indicated it would try to get that information to the sheriff's department for purposes of further service efforts.

On April 5, 2012, the court once again continued the hearing on the order to show cause because the sheriff's department was still unsuccessful in its efforts to serve mother. On April 18, the court noted the sheriff's department reported five attempts to serve mother on four different dates and had made additional efforts to confirm her address. The court once again continued the hearing to May 3, 2012. On May 3, father's counsel stated the court the sheriff's department was still unable to serve mother and asked for one more continuance "before the termination review on May 24." The court granted the request, setting the continued hearing for May 24, 2012.

In connection with the May 24 termination review hearing, SSA filed a report recommending termination of jurisdiction over P.W. with an exit order awarding custody to father. The report noted that P.W. had been placed with father since February 16, 2012, was healthy and doing very well. P.W. interacted appropriately with his two

half-brothers, who likewise appeared healthy and well cared for. With respect to mother, the report reflected numerous efforts to contact her regarding scheduled visitation, but to no avail. Initially, the visitation monitor was able to leave telephone messages for mother, but the messages were not returned. Later, the phone number initially used was reported to be "invalid," and other contact numbers obtained by SSA were reported to be "disconnected." Father expressed frustration that mother, who had not yet been served with the restraining order, persisted in calling him "around the clock" to harass him – including with death threats – but did not make any effort to visit with P.W. He supplied SSA with six different telephone numbers from which mother had placed calls to him since March. Father explained he would like the dependency case closed "so they could work on the healing process."

In light of mother's "non-complian[ce]" and her failure to make "any effort to contact [SSA] for visits with the child," SSA concluded she had "no interest in the well-being of the child" and "it would be appropriate to terminate proceedings."

Mother once again failed to appear at the hearing on May 24, 2012. Father's counsel reported that mother had continued to elude service of the temporary restraining order despite the efforts of both her office and the sheriff's department. In light of the inability to serve mother, father's counsel asked that the order to show cause on the restraining order go off calendar. With respect to the "termination review" issue, father's counsel explained that while father was in agreement with SSA's recommendation to terminate jurisdiction, she believed that because the hearing date was "non-statutory," mother's counsel "has the right to take the hearing off calendar." Father's counsel then stated father intended to file a section 388 motion that day, also seeking an order to terminate jurisdiction.

P.W.'s counsel also expressed agreement with the idea of terminating jurisdiction, noting father is "an excellent father," who is "taking very good care of his

children." Her only reservation concerned the family's safety "because of [mother's] threat to kill the father."

As anticipated, mother's counsel then informed the court she was requesting the termination review hearing go off calendar, since it was a "non-statutory date" and she had "no information" regarding mother's position on the issue of terminating jurisdiction. The court, after expressing some frustration with mother's evasion, her failure to visit with P.W., and her general attitude of non-compliance, ordered the matter off calendar, noting the six-month review hearing remained on calendar for September 11.

Father did file his section 388 motion that same day. He relied largely upon the facts contained in SSA's most recent report and argued court supervision over P.W. was no longer required to ensure his safety and that P.W. would benefit from eliminating "the . . . interference that naturally arises from having an open dependency." The following day, Friday May 25, the court set a "prima facie hearing" for June 12, 2012, to determine whether there was sufficient evidence to warrant a full hearing on the section 388 motion. It ordered the clerk to give notice to all counsel and specifically ordered mother's counsel to notify her.

The court subsequently ordered the prima facie hearing advanced to Wednesday, May 30, pursuant to the agreement of all counsel. However, when the hearing commenced on that date, mother's counsel objected to proceeding, explaining that while she had spoken with mother "at the end of the week" and had also given mother notice of the June 12 date by e-mail – the means of communication mother had advised her was best to use – she had not received any response and thus "did not know if [mother] has a desire to be present." Counsel then requested the matter revert to the June 12 date for which mother had been given notice.

After further discussion, mother's counsel clarified that if the court felt it was appropriate to proceed with the prima facie hearing that day, she was prepared to do so and asked only that if the court determined there was sufficient basis to warrant an evidentiary hearing on the section 388 petition, "I have sufficient time to notice my client with regard to that." She then suggested the evidentiary hearing could be set for June 12, "as [mother] has already received notice of a hearing set for that date."

The court then proceeded with the prima facie hearing and found there was sufficient evidence of both a change in circumstances and that a termination of jurisdiction would be in P.W.'s best interests, to warrant an evidentiary hearing on the section 388 petition. It then set that hearing for June 12 and ordered mother's counsel to once again give her notice; the court also ordered the clerk to send notice to mother's last known address.

Mother failed to appear at the June 12 hearing. Her counsel again asked the court to continue the matter so she could "make further attempts to locate [mother.]" Counsel explained with more specificity that she had spoken with mother "*on May 25th after receiving the notification that prima facie would be heard on June 12 and to advise her of the June 12 date*." (Italics added.) During that conversation mother informed counsel that e-mail was the best way to contact her. Counsel stated she had e-mailed mother about the June 12 date, but had not received any response. She then argued that because she had an e-mail address which "mother purports to check regularly, . . . with a little more time, I may be able to secure mother's presence." The court denied the requested continuance.

On the merits, father's counsel first acknowledged the proposed exit orders requested were "very strict," with father getting sole physical and legal custody, and no visitation ordered for mother. Counsel explained this arrangement was appropriate, however, because of mother's lack of compliance and her inappropriate behavior,

including making threats against both father and P.W. Counsel then pointed out that mother's unwillingness to make her whereabouts known made it virtually impossible for father to work with her to arrange visitation or make decisions concerning P.W.'s welfare. Both SSA and minor's counsel joined in father's request.

Mother's counsel stated mother was "opposed to the case closing" and to the "proposed exit orders." She explained mother had "provided me with a litany of concerns which she has purported to track down the evidence of to support," but did not disclose what those concerns were. Counsel further explained that "[i]f the case does close, mother would be asking for joint legal custody and for the court to make appropriate visitation orders." Counsel acknowledged that while "mother has not seen the child recently through Social Services' provisions for visitation, [she] does love her child and would like the opportunity to continue to be a part of her child's life."

After considering the evidence and the parties' arguments, the court granted father's motion to terminate jurisdiction as proposed. It vested full legal and physical custody of P.W. in father and ordered no visitation for mother.

DISCUSSION

1. The Court Did Not Abuse its Discretion by Denying Visitation

Mother first contends the trial court abused its discretion by failing to order visitation for her when it terminated dependency jurisdiction over P.W. "Under section 362.4, the juvenile court may, when it terminates jurisdiction over a case, issue an order 'determining the custody of, or visitation with, the child.' The juvenile court's section 362.4 order may be enforced or modified by the family court." (*In re Ryan K.* (2012) 207 Cal.App.4th 591, 594, fn.5.) As mother acknowledges, "'[t]he appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.'" (*In re Stephanie*

M. (1994) 7 Cal.4th 295, 318-319.) What this means, however, is that we "'will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination . . . .'" (*Id.* at p. 318.) Moreover, "'[w]hen two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" (*Id.* at p. 319.)

Mother's position is that the court's decision to deny her visitation following termination of the dependency case qualifies as an abuse of discretion because it cannot be reconciled with the court's earlier determination that it was in P.W.'s best interests to provide her with visitation during the pendency of the case. In mother's view, there was no significant change in circumstance and she complains the court "made no findings of fact nor did it state any other reason for drastically changing the prior court order for twice monthly visits to an order denying any visits at all."

We are unpersuaded. Mother's argument simply ignores the fact that the termination of court supervision was itself a significant change in circumstance warranting a change in the visitation order. The visitation offered to mother during the dependency case was tightly controlled due to safety concerns arising out of her threats and harassing behavior. The court ordered father's address remain confidential, all visitation be professionally monitored and take place at a confidential location chosen by SSA, and that transportation of P.W. to the visits be provided by [a] SSA designee. Once jurisdiction was terminated, SSA would no longer be involved and able to continue those significant protections. Consequently, an order providing for visitation between mother and P.W. after termination of jurisdiction would have compromised the safety of both P.W. and father.

Moreover, while we acknowledge mother's point that regular visitation between parent and child is a significant right, which helps to maintain that important

relationship, we cannot ignore – nor expect the juvenile court to ignore – the fact that mother made no apparent effort to exercise that right during the pendency of the case. While mother, through her counsel, expressed her love for P.W. and her desire to be a continuing part of his life, her conduct throughout the case rather clearly suggested she was not able to participate in meaningful visitation. The court was not required to pretend otherwise in formulating its exit orders. We find no abuse of discretion.

2. The Section 388 Petition was Supported by Substantial Evidence

Mother also contends there was insufficient evidence of any change in circumstances to support father's section 388 petition. Again, we disagree. Mother asserts "there had been no significant change of circumstance *other than father's unsworn and uncorroborated statements that [she] was harassing and threatening him.*" (Italics added.) But those assertions, made in support of father's request for a restraining order, were under oath and thus do qualify as substantial evidence. Further, the court was entitled to believe father, and mother's attempt to undermine his credibility on appeal is simply ineffective. Appellate courts "'cannot reweigh evidence or pass upon witness credibility. The trial court is the sole arbiter of such conflicts. Our role is to interpret the facts and to make all reasonable inferences in support of the order issued. [Citation.]'" (*People Ex. Rel. Harris v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561, 1567.)

Additionally, of course, there was the evidence mother had eschewed visitation and was not cooperating in any aspect of the dependency case, plus the evidence that father was providing P.W. with a safe and stable home. Taken together, these circumstances were more than sufficient to justify the court's consideration of a petition to terminate jurisdiction.

3. Mother Received Actual Notice of the Section 388 Petition

Finally, mother asserts the court had no authority to terminate jurisdiction because she was not provided with proper statutory notice of the section 388 hearing. We disagree. First, we note it is undisputed mother was served with notice of the dependency proceeding and she appeared in court at the detention hearing. She was aware of the ongoing nature of the case and had maintained at least sporadic contact with her counsel.

Second, as explained in *In re Justice P.* (2004) 123 Cal.App.4th 181, "[i]t is not always possible to litigate a dependency case with all parties present. The law recognizes this and requires only reasonable efforts to search for and notice missing parents. Where reasonable efforts have been made, a dependency case properly proceeds. If a missing parent later surfaces, it does not automatically follow that the best interests of the child will be promoted by going back to square one and relitigating the case. Children need stability and permanence in their lives, not protracted legal proceedings that prolong uncertainty for them. Further, the very nature of determining a child's best interests calls for a case-by-case analysis, not a mechanical rule." (*Id.* at p. 191.) Thus, "there is no due process violation when there has been a good faith attempt to provide notice to a parent who is transient and whose whereabouts are unknown for the majority of the proceedings. [Citations.]" (*Id.* at p. 188.)

Section 297, subdivision (c), specifies the required notice to be given in the case of a section 388 petition and explicitly recognizes the need for flexibility: "If a petition for modification has been filed pursuant to Section 388, and it appears that the best interest of the child may be promoted by the proposed change of the order, the recognition of a sibling relationship, *or the termination of jurisdiction*, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the social worker or probation officer and to the child's attorney of record, or if there is no attorney of record for the child, to the child, and his or her parent or parents or legal

guardian or guardians in the manner prescribed by Section 291 *unless a different manner is prescribed by the court*." (Italics added.)

Here, by the time father filed the section 388 petition, it was well-established mother could not be served with notice by usual means. She refused to appear for hearings, had no fixed address or reliable phone number, and had managed to evade repeated efforts to serve her with a temporary restraining order. Nonetheless, when the court ordered mother's counsel to provide her with notice of the section 388 petition, counsel reported back to the court that *she had done so*. Specifically, mother's counsel stated she had spoken with mother "on May 25*th after receiving the notification that prima facie would be heard on June 12 and to advise her of the June 12th date*." (Italics added.) Because mother informed her counsel during that conversation that e-mail was the best way to contact her, counsel also e-mailed mother about the June 12 date.

Thus, it was at the specific request of mother's counsel that the court set the evidentiary hearing on the section 388 petition for June 12; i.e., the date counsel had already notified mother would be the hearing date in connection with the section 388 petition. The court then ordered mother's counsel to again provide her with notice. Under the circumstances, we conclude this was not only an eminently reasonable manner of providing notice to mother, but also the manner most likely to be effective; it thus satisfied the notice requirement of section 297, subdivision (c).

Finally, even if we believed there were a flaw in the notice provided to mother in connection with the section 388 petition, we would find it harmless. (*In re A.D.* (2011) 196 Cal.App.4th 1319, 1325 ["a failure to give notice in dependency proceedings is subject to a harmless error analysis. Because mother did not show a more favorable result was likely absent the error, the orders stand."].) There is absolutely no

evidence to suggest that if mother had received some other form of notice, she would have appeared at the hearing on June 12, nor is there any basis to conclude the outcome of the hearing would have been altered.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.